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Indiana Law Journal

Volume 9 | Issue 8

Article 3

5-1934

Can a State Regulate Prices of a Private Industry?

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COMMENT

CAN A STATE REGULATE PRICES OF A PRIVATE INDUSTRY?

A few months ago, the New York Court of Appeals held that the legislature of New York could constitutionally regulate the price of milk.[1] The case was immediately appealed to the United States Supreme Court, and with the possible exception of the Minnesota Moratorium Case, no recent case has attracted so much attention. Law writers, teachers, and practitioners eagerly awaited the decision of our highest court, and speculated as to what it would be. This interest was intensified by the fact that the validity of much of our "New Deal" legislation depended upon the answer.[2] Finally, on March 5, the court rendered its verdict.[3] The vote was five to four in favor of the legislation.

Does this decision give to the law a new concept of price fixing? Before attempting to answer this question, it is highly important to note that the court expressly decides that the milk industry is not a public calling.[4] With this in mind, a brief survey of the court's general attitude prior to this decision is deemed appropriate.

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1 People v. Nebbia (1933), 262 N. Y. 259, 186 N. E. 694. In this case the legislature, after finding there was an economic emergency in the milk industry, created a temporary Milk Control Board which was authorized to fix minimum prices for milk. A failure to comply with the Board's regulations was made a crime. Defendant violated such regulations, was tried, and convicted. The upper court affirmed the conviction upon the ground that the statute was a valid and reasonable exercise of the police power for the protection of the public welfare and hence was due process of law.

2 While the recent Federal legislation involves many constitutional questions, the price fixing provisions are among the most important.

3 Nebbia v. People of State of New York (1934), 54 Sup. Ct. Rep. 505.

4 It was generally thought that the industry might be declared one affected with a public interest because of the emergency existing in the milk industry. However, the emergency doctrine is not discussed at all.

The case of Munn v. Illinois[5] is generally considered the landmark in constitutional law on the question of price fixing. In that case, a statute fixing the maximum price for the storing of grain was held constitutional because the business was a public calling—that is, "affected with a public interest." The court held that the grain elevators of Chicago were affected with a public interest because of the virtual monopoly in the business. Chief Justice Waite writing the majority opinion adopted the test coined by Lord Hale[6] in the latter part of the seventeenth century, and the phrase "affected with a public interest" became a part of our constitutional law. A few years later, two more grain elevator cases came before the court and the same result was reached.[7] One of these cases is significant in that legislative declaration was held sufficient to make the business one affected with a public interest.[8] The next case of importance is German Alliance Insurance Co. v. Lewis[9] in which it was held that the business of fire insurance was of such a character as to come within the "public interest" rule of the Munn case. The test there adopted was twofold, namely, that of indispensable service and virtual monopoly. Then followed the case of Wolfe Packing Co. v. Court of Industrial Relations,[10] which held that a statute attempting to fix wages paid by packers was invalid. However, the case dealt with wage fixing alone, and the court left open the question as to whether the preparation of food could be subjected to regulation as a utility. But the case is important in that it overruled legislative declaration as a test of a public calling.[11] Moreover, the idea that an industry, otherwise subject to various kinds of regulation, might, nevertheless, not be subject to legislative price fixing, made its appearance in this case.

It was at this point that the court began to assume a more conservative attitude on the question of price fixing. The case

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5 (1877), 94 U. S. 113, 24 L. Ed. 77.

6 The law of public callings was developed largely through the influence of Lord Hale. See 3 Ind. L. Journal 384; Willis, Introduction to Anglo-American Law, p. 123.

7 Brass v. North Dakota (1894), 153 U. S. 391, 38 L. Ed. 757; Budd v. State of New York (1892), 143 U. S. 517, 36 L. Ed. 247.

8 Brass v. North Dakota ibid.

9 (1914), 233 U. S. 389, 58 L. Ed. 1011.

10 (1923), 262 U. S. 522, 67 L. Ed. 1103.

11 See also Frost v. Ry. Comm. of Calif. (1926), 271 U. S. 583, 70 L. Ed. 1101.

of Tyson v. Banton[12] indicates this inasmuch as the court held that the theatre business was not sufficiently clothed with a public interest to justify the regulation of prices for the resale of tickets. The court emphasized the fact that no indispensable service was rendered. Again the court declares that there is a great deal of difference between regulation as to price and regulation with respect to other features of the business. The next year, the court in Rebnick v. McBride[13] held invalid a statute regulating the rates of private employment agencies. Mr. Justice Sutherland speaking for the majority employs the same reasoning he used in Tyson v. Banton and disposes of the case in a short opinion.[14] However, by way of obiter dictum, he indicates that the legislature has no power to fix prices for food. Next came the decision in Williams v. Standard Oil Co.,[15] involving a statute authorizing a commission to fix the price for gasoline. The statute was held unconstitutional, and Mr. Justice Sutherland again speaking for the court seems to definitely answer the question of price fixing when he says, "It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is affected with a public interest." The decision also signifies that the court has finally adopted a definite test for a business affected with a public interest, namely, that of virtual monopoly plus indispensable service.

With the court thus indicating a taboo on the matter of price fixing, the decision in Stephenson v. Binford[16] rendered in 1932 came as a surprise to many. In this case, the court withheld the validity of a Texas statute giving to a commission the power to regulate private contract carriers, including the power to fix minimum rates. The significant thing is the statement by the court that it was unnecessary to determine whether the business was affected with a public interest. But more amazing yet is the fact that Mr. Justice Sutherland delivered the majority

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12 (1927), 273 U. S. 418, 71 L. Ed. 718.

13 (1928), 277 U. S. 350, 72 L. Ed. 913.

14 It is interesting here to note that a statute providing for regulation of employment agencies by means other than price control has been held constitutional; See Brazer v. Michigan (1915), 241 U. S. 340, 60 L. Ed. 1034.

15 (1929), 278 U. S. 235, 73 L. Ed. 287.

16 (1932), 287 U. S. 251, 77 L. Ed. 288.

opinion. In deciding that the fixing of minimum rates was valid, he made no mention of the three previous decisions in which he so steadfastly argued that price fixing of a purely private business was not due process of law. His argument is simply this: the statute undoubtedly interferes with the freedom of the parties to contract, but that freedom is always subject to restraint whenever necessary for the safety and welfare of the state. This manner of approach is certainly at variance with that employed in the last three decisions. As heretofore pointed out, the validity of the legislation in those cases depended altogether upon whether the business was one affected with a public interest, whereas in the Stephenson Case, the sole question was whether the regulation was necessary to protect the general welfare of the state. In view of the fact that a similar factual situation was involved in the Stephenson Case, the only logical deduction is that it overruled the former cases.[17] At any rate, it denoted a decided swing away from the public calling concept, and it is the opinion of the writer that the decision is ample authority for the result in the Milk Case, for in both cases the same question is involved—that of price fixing in a private industry. However, it may be argued that the Stephenson Case didn't directly overrule the older cases.[18] If such a position is tenable, then it seems clear that the Milk Case gives us some new law directly overruling the dogma of the previous cases and introduces an era of governmental regulation.

REASONING OF THE COURT IN THE MILK CASE

The majority opinion is written by Mr. Justice Roberts, who indulges in some ingenious sophism in arriving at the result. As heretofore mentioned, he states that the milk industry is not a public utility. It is submitted that no one will seriously quarrel with this conclusion in view of the fact that the industry is not monopolistic in character. But he does not stop there. He says although it is not a public calling it is nevertheless a "business affected with a public interest." Since the two terms are always thought of as being synonymous, what sort of logic

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[17] See 8 Ind. L. J. 552. Wherein it is pointed out that the only reasonable deduction from the language of the court is that such regulations may be imposed on a private business.

[18] Mr. Justice Sutherland apparently would take this position since he concurs in the dissenting opinion in the Milk Case.

is this? The learned Justice has a unique answer. His reasoning is that the phrase as used in the famous case of Munn v. Illinois meant nothing more than that the business was subject to the exercise of police power and that any other meaning is a misconception. But the persuasiveness of his argument is negatived by the fact that the court has used this phrase for over a half century to define a public calling. However, Justice Roberts would have us believe that the decision meant simply that if the business affected the public it could be subjected to legislative price fixing. It is submitted that no exercise of the police power is valid unless the business affects the public in some manner, but price fixing as an exercise of the police power according to the Munn case is only valid where a virtual monopoly exists in the business. If the phrase meant no more than he contends, no exercise of the police power would be valid unless virtual monopoly existed in the business being regulated. Roberts' answer to this is that Chief Justice Waite in writing the opinion in the Munn case didn't adopt virtual monopoly as a test. He suggests that Waite only meant it was a circumstance to be considered in justifying governmental control. Certainly this is at odds with the usual interpretation of Waite's language. Later in the opinion, he says monopoly is not a test at all and cites Brass v. North Dakota[19] as the authority for that proposition. The fallacy of this argument is that this case has been overruled[20] and later cases have applied virtual monopoly as one of the tests.[21] Mr. Justice McReynolds, writing the minority opinion in the principal case points out the fallacy of the argument and says such an implication is at variance with what the court has repeatedly held. That McReynolds has the better of the argument can hardly be questioned.

Although Justice Roberts' interpretation of what was decided in the Munn case may be open to question, it doesn't detract from the rest of his reasoning, which clearly supports the result reached. First of all, the court repudiates the unexplained idea that price fixing and regulation of other kinds should be treated in a different manner. Prior to the decision in the instant case, the court, as we have seen, distinguished between the two types of regulation, holding that if there existed a sufficient social

[19] (1894), 153 U. S. 391, 38 L. Ed. 757.

[20] Frost v. Ry. Comm. of Calif. (1926), 271 U. S. 583, 70 L. Ed. 1101.

[21] See 3 Ind. L. J. 385; German Alliance Ins. Co. v. Lewis (1914), 233

interest all sorts of industry might be subjected to rigid regulations of various kinds; but if price fixing was attempted, it was valid only in the field of public callings. Other burdens such as the obligation to serve everybody, without discrimination and to provide reasonable adequate facilities were also confined to public callings or businesses affected with a public interest. The following quotation from the opinion clearly shows that this concept, at least so far as price fixing is concerned, has ceased to be of any force:

"But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principal bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property."

The court then seeks to strengthen its position by citing instances wherein price fixing of a purely private business has been upheld. The first of these is the usury laws, and it is submitted that they are clearly in point, for those laws fix the price at which money may be used. Then the court points out that rate fixing in a private business is valid according to the rule of Stephenson v. Binford. As previously indicated, that decision alone is sufficient authority for this case. The court then concludes with the thought that a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and that price control like any other form of regulation is unconstitutional only if arbitrary, discriminatory, or irrelevant to the policy of the legislature.

IS THE RESULT A RATIONAL ONE

The result of the decision at first blush appears to be a trifle revolutionary, but upon careful analysis it seems a sane and practical one. As heretofore noticed, the court has invoked a different rule in determining the constitutionality of regulations other than price fixing. It has been content in those cases to determine whether the legislation was necessary to protect the safety, health, or general welfare of the people. And it has sanctioned regulations of that kind even though they deprived the owner of his property.[22] Thus we must squarely face this question: Is there any logical reason why price fixing should be afforded extra protection? Would it not seem that an actual taking of the property itself is of equal, if not greater severity than regulation with regard to price? Clearly the answer should be in the affirmative. Furthermore, the distinction is weakened by the fact that no reason has ever been suggested as to why freedom of contract in the making of price should be afforded this additional safeguard. Thus, as a matter of logic it would appear that there is no basis for the distinction. Also from a historical standpoint, there appears to be nothing odious about price fixing. In early English history, price fixing was the rule not the exception, and when the Constitution of the United States was adopted, legislative price fixing was familiar in practically all of the colonies. Moreover, assuming the more conservative rule may have been desirable, it has outgrown its usefulness. The strong dissents of Holmes, Stone, and Brandies in the other cases indicate an outright dissatisfaction with the practical aspects of the approach formerly used.[23] So the court's frequent change of opinion as to the test for a business affected with a public interest is a strong argument against its practicability as a criterion for the constitutionality of the legislation. The

U. S. 389, 58 L. Ed. 1011; Williams v. The Standard Oil Co. (1929), 278 U. S. 235, 73 L. Ed. 287.

[22] Noble State Bank of Haskell (1911), 219 U. S. 104, 55 L. Ed. 112; Jackman v. Rosenbaum Co. (1922), 260 U. S. 22, 67 L. Ed. 107; Reinman v. Little Rock (1915), 237 U. S. 171, 59 L. Ed. 900. See also Freund Police Power Chap. II.

[23] In Tyson v. Banton, Holmes expresses his views in a clear cut manner when he says: "the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers." Stone's separate dissent in the same case, is just as strong. He says: "The phrase business affected with a public interest seems to me to be too vague and illusory to carry us very far on the way to a solution. It tends in use to become only a convenient expression for describing those businesses, regulation of which has been permitted in the past. To say that only those businesses affected with a public interest may be regulated is but another way of stating that all those businesses which may be regulated are affected with a public interest." And even Sutherland who so steadfastly applies the phrase has this to say in Tyson v. Banton: "This phrase first used by Lord Hale 200 years ago, it is true, furnishes at best an indefinite standard, and attempts to define it have resulted, generally, in producing little more than paraphrasis, which themselves require elucidation."

recent change in economic conditions is another momentous factor to be considered as movements of this kind oftentimes require new remedies. The conditions existing in the milk industry are an example of this change. Competitive bargaining had ceased to be an efficient regulator, and this lack of self regulation resulted in serious injury to both the producer and consumer.[24] So when it appeared that price fixing was the only adequate solution of the problem, the court, thrusting aside its conservatism, balanced the social interests of the producers and the people as a whole with those of the merchant and reached what appears to be a very desirable result. The method of approach employed by the court is highly commendable in that it permits a pragmatic inquiry into the necessity in each particular case and removes a superfluous limitation. Or in other words, the solution in each case involves nothing more than a careful and realistic balancing of the social interests involved.

The decision removes a great deal of uncertainty as to the price fixing provisions of the "New Deal" legislation and it is the opinion of the writer that those provisions will not meet with much difficulty if the court finds that price control is an effective method of protecting the paramount social interests involved. It will also be interesting to watch the effect of the decision upon the law of public callings. Since this sort of control (price fixing) was formerly confined solely to the field of public callings, is there any logical reason why other burdens so far only borne by public callings, could not likewise be imposed on a private business?

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[24] Stone has always contended that price control should be allowed whenever competitive bargaining ceases to be an efficient regulator of business. See his dissenting opinion in Tyson v. Banton.